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No. 380

In the Supreme Court of the United States

OCTOBER TERM, 1968

ANDREW DYMYTRYSHYN, ET AL., APPELLANTS

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE NEW YORK DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE AT NEW YORK, NEW YORK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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INDEX

	Page
Statement	1
Argument	5
Conclusion	9
Appendix	10

CITATIONS

Cases:

Barton v. *Sentner*, 352 U.S. 963	7
Braden v. *United States*, 365 U.S. 431	7
Cheng Fan Kwok v. *Immigration and Naturalization Service*, No. 638, O.T. 1967, decided June 10, 1968	3
Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1	6
Cox v. *United States*, 332 U.S. 442	8
Estep v. *United States*, 327 U.S. 114	8
Falbo v. *United States*, 320 U.S. 549	8
Foti v. *Immigration and Naturalization Service*, 375 U.S. 217	3
Galvan v. *Press*, 347 U.S. 522	2, 9
Heckler v. *Shepard*, 243 F.Supp. 841	7
Rowoldt v. *Perfetto*, 355 U.S. 115	2
Sentner v. *Colarelli*, 145 F.Supp. 569	7
Siminoff v. *Esperdy*, 267 F.2d 705	7
Sinclair v. *United States*, 279 U.S. 263	7
United States v. *Brown*, 381 U.S. 437	8, 9
United States v. *Spector*, 343 U.S. 169	5
United States v. *Witkovich*, 352 U.S. 194	4
United Steelworkers v. *Bagwell*, 383 F.2d 492	7
Woodby v. *Immigration and Naturalization Service*, 385 U.S. 276	4
Yakus v. *United States*, 321 U.S. 414	8

Page

Constitutional provision, statutes, and regulation:

U.S. Constitution:

Sixth Amendment 5, 7

Act of September 3, 1954, § 17, 68 Stat. 1232 10

Immigration Act of 1917, § 20(c), as amended (8 U.S.C. (1946 ed., Supp. IV) 156(c)) 6

Immigration and Nationality Act:

§ 106(a) (8 U.S.C. 1105a(a)) 3

§ 106(a)(4) (8 U.S.C. 1105a(a)(4)) 3

§ 106(a)(6) (8 U.S.C. 1105a(a)(6)) 3, 5, 11

§ 241(a)(6)(C)(i) (8 U.S.C. 1251(a)(6)(C)(i)) 2

§ 242(d) (8 U.S.C. 1252(d)) 2, 3, 4, 8, 10

§ 242(e) (8 U.S.C. 1252(e)) 6

§ 360(a) (8 U.S.C. 1503(a)) 12

Labor-Management Reporting and Disclosure Act of 1959, § 504 8

28 U.S.C. 2201 12

8 C.F.R. 242.2(d) 3

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from an order of a three-judge district court, entered on July 16, 1968, granting the motion for summary judgment of the District Director of the New York District of the Immigra-

tion and Naturalization Service in an action by appellants, six aliens who are the subjects of unexecuted deportation orders, to enjoin the enforcement of orders for their supervision issued pursuant to Section 242(d) of the Immigration and Nationality Act.

Appellants, all of whom were admitted to the United States for permanent residence many years ago, were ordered deported on different dates between 1951 and 1958 as aliens who, after entry, had been members of the Communist Party.[1] Because of the refusal of their countries of origin to accept them, the Immigration and Naturalization Service has been unable to effect their deportation. (J.S. App. 14, 19; R. 11, pp. 2-4; R. 15, p. 3).[2] Each appellant is, and for years has been, subject to an order of supervision, issued by appellee under Section 242(d) of the Immigration and Nationality Act (8 U.S.C. 1252(d), Appendix, *infra*, pp. 10-11; see J.S. App. 14, 19-21).

Section 242(d) provides that any alien against whom a final order of deportation has been outstanding for more than six months shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General, which shall include a requirement that the alien appear from time to time before an immigration officer for identification and that he conform to such reasonable restrictions on

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[1] See Section 241(a)(6)(C)(i) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(6)(C)(i)); *Galvan* v. *Press*, 347 U.S. 522; *Rowoldt* v. *Perfetto*, 355 U.S. 115.

[2] "J.S." refers to the Jurisdictional Statement. The record ("R.") is cited by the document number designated, followed, where appropriate, by the page number of the document referred to.

his activities as may be prescribed in his case.[3] Willful failure to comply with such a regulation is a misdemeanor punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both.

Section 106(a)(6) of the Act (8 U.S.C. 1105a(a)(6), Appendix, *infra*, pp. 11-12) provides that in a criminal proceeding under Section 242(d) the accused may challenge the validity of the deportation order only by separate motion for judicial review made before trial;[4] that if such a motion is made it shall be determined by the court alone, sitting without a jury; that if the accused makes a claim of American nationality presenting a genuine issue of material fact he is entitled to a *de novo* hearing on the issue, but that otherwise the validity of the deportation order is to be determined solely on the administrative record and that the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence, are to be conclusive.[5]

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[3] The applicable regulation (8 C.F.R. 242.2(d)), aside from designating the local Service officials by whom the supervision is to be exercised (district directors and their deputies), merely incorporates by reference the provisions of the statute.

[4] The pre-trial review authorized may be had only if the deportation order has not already been judicially sustained. The normal method of judicial review is by petition for review in a court of appeals—the procedure prescribed by the principal clause of Section 106(a) (Appendix, *infra*, p. 11). See *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217; *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, No. 638, Oct. Term, 1967, decided June 10, 1968.

[5] This Court's construction of the "reasonable, substantial, and probative evidence" clause of Section 106(a)(4) of the

The orders of supervision in effect at the commencement of the proceeding at bar required, among other things, that appellants report in person to the Service's New York office on designated dates at three-month intervals and that they not travel beyond the borders of the New York Immigration District (the State of New York) for more than 48 hours without notifying the Service in advance of the dates and places of the proposed travel (R. 11, p. 2; R. 9, exhibits annexed to affidavits).[6]

In the court below, appellants sought injunctive and declaratory relief on the ground that Section 242(d)

Act (8 U.S. C. 1105a(a)(4)) as requiring proof of deportability by "clear, unequivocal, and convincing evidence" (*Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276) would of course apply with equal force to the identical provision of Section 106(a)(6).

[6] The orders have since been modified, pursuant to a suggestion by the court below at oral argument. As modified, the orders reduce the frequency of the required reports in person from four times to once a year; add New Jersey and Connecticut to New York as the area within which appellants may travel without restriction of any kind; increase from 48 to 72 the number of hours of permissible travel beyond the tri-State unrestricted area without the necessity of notifying the Service; and permit notice to be given, when required, within 72 hours *after* the pertinent period of travel has begun (J.S. App. 19-20). Upon remand by the three-judge court to the single judge for consideration of the non-constitutional issue of the reasonableness of the orders in the light of their purpose to insure the availability of appellants for deportation in the event that deportation becomes possible (see *United States* v. *Witkovich*, 353 U.S. 194), the orders, as modified, were approved (J.S. App. 17, 19-21). Appellants do not press in this Court their previously urged contention that the orders of supervision, both in their original form and as modified, were not reasonably related to that purpose (J.S. 3, 7).

is unconstitutional because, when read in conjunction with Section 106(a)(6), it deprives the accused, in a prosecution for violating an order, of the right to a jury trial on the issue of his deportability, in violation of the Sixth Amendment, and denies him the right to require the government to prove deportability beyond a reasonable doubt, in alleged violation of procedural due process (R. 12, pp. 6-11). Appellants further contended that Section 242(d), as applied to them, is a bill of attainder (R. 12, pp. 12-13).

Holding that appellants lacked standing to raise the Sixth Amendment and due process issues (J.S. App. 15-16), and rejecting on its merits the argument that the challenged statute, as applied, is a bill of attainder (J.S. App. 16-17), the court below granted a motion by appellee for summary judgment (J.S. App. 17-18).

ARGUMENT

1. The court correctly held that appellants lack standing to raise the Sixth Amendment and due process issues posed. The provision appellants attack is essentially a rule of criminal procedure, establishing a standard of proof and delineating the respective provinces of the judge and jury in prosecutions for violation of orders of supervision. Since appellants have neither violated their supervision orders nor asserted any immediate intention of doing so, any criminal prosecutions against them are purely hypothetical. As this Court observed in *United States* v. *Spector*, 343 U.S. 169, which involved a prosecution under a

companion provision to the enactment challenged here,[7] "It will be time to consider whether the validity of the order of deportation may be tried in the criminal trial either by the court or by the jury * * * when and if the appellee [the defendant] seeks to have it tried" (at 172-173). Cf. *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 70-81.

To hold that appellants have standing to raise these questions would open every rule of criminal procedure to attack by anyone, on the theory that a hypothetical criminal prosecution against him might some day be governed by such rule. Appellants' claim is no less premature than would be, for example, the claim of a selective service registrant that his induction into the Army should be enjoined because in a prosecution for violating the induction order he would be refused a jury trial on the propriety or validity of his draft classification, or the claim of one summoned to appear before a congressional committee that his subpoena should be quashed because in a prosecution for refusing to answer the committee's questions the court

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[7] Section 20(c) of the Immigration Act of 1917, as amended (8 U.S.C. (1946 ed., Supp. IV) 156 (c)), now Section 242(e) of the Immigration and Nationality Act (8 U.S.C. 1252(e)), providing for the punishment of any alien (of designated classes) against whom a final order of deportation is outstanding and who wilfully fails or refuses to make timely application for travel or other documents necessary to his departure.

and not the jury would judge the pertinency of the questions to the subject under inquiry.[8]

Since appellants are not challenging the validity of the orders of supervision *per se*, but are merely attempting to question the procedures that would be used at a criminal trial if they should violate the orders, the present case is clearly distinguishable from *Barton* v. *Sentner*, 353 U.S. 963, affirming *Sentner* v. *Colarelli*, 145 F. Supp. 569 (E.D. Mo.), and from *Siminoff* v. *Esperdy*, 267 F.2d 705 (C.A. 2). In those cases the challenge was to the restrictions contained in the supervision orders, a matter which was immediately affecting the alien. Similarly distinguishable are cases such as *United Steelworkers* v. *Bagwell*, 383 F.2d 492 (C.A. 4), and *Heckler* v. *Shepard*, 243 F. Supp. 841 (D. Idaho), where the challenge was directed at the validity of a statute which had an immediate "chilling effect" on the exercise of rights protected by the First Amendment. Here, the appellants do not dispute the right of the Attorney General to regulate their conduct by issuing supervision orders or his right to prosecute them for violations of such orders. They attack only the procedures which would be employed at their trials if they were prosecuted, and it is that attack which the court below properly held to be premature.

At all events, appellants' Sixth Amendment and due process arguments are without merit. The contention

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[8] See *Braden* v. *United States*, 365 U.S. 431, 435-437, rejecting, on the merits, a claim that the pertinency issue is for the jury. See, also, *Sinclair* v. *United States*, 279 U.S. 263, 298-299.

that in a prosecution for violating a supervision order the accused has a constitutional right to a jury trial on the issue of the validity of his deportation order is in every respect analogous to the claim of a selective service registrant, in a prosecution for failing to report for induction, that he is entitled to a jury trial on the issue of the propriety of his draft classification. The decisions of this Court have firmly established that there is no such right. *Cox* v. *United States*, 332 U.S. 442, 452-453. Cf. *Estep* v. *United States*, 327 U.S. 114, 121-123; *Falbo* v. *United States*, 320 U.S. 549, 553-555. As noted in the *Cox* case, 332 U.S. at 453, "the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order" (opinion of Mr. Justice Reed, concurred in by Chief Justice Vinson and Justices Jackson and Burton). Cf. *Yakus* v. *United States*, 321 U.S. 414, 444.

2. Relying on *United States* v. *Brown*, 381 U.S. 437, which held that Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 constituted a bill of attainder because it made it a crime for a member of the Communist Party to be an officer of a labor union, appellants contend that Section 242 (d) is a bill of attainder. While *United States* v. *Brown* might have some relevance to the question of the validity of the orders of deportation (since it might be argued that the bill of attainder clause prohibits Congress from making an alien deportable because he becomes a member of the Communist

Party),[9] appellants are not here challenging the validity of the orders of deportation. Accepting, as appellants have in this proceeding,[10] the validity of the deportation orders, the orders of supervision at issue here have no effect on appellants' membership in the Communist Party. Since appellants can join or continue in the Communist Party without violating the supervision orders, the holding of the court in *United States* v. *Brown* is wholly inapposite to the case at bar. Here, appellants' membership in the Communist Party does not subject them to any different treatment from that accorded to all other deportable aliens whose deportation can not be effected immediately.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be summarily affirmed.

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SEPTEMBER 1968.

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[9] But see *Galvan* v. *Press*, 347 U.S. 522, holding that this clause of the Constitution does not apply to deportation.

[10] Appellant Tormey is challenging the validity of her deportation order in a separate case which is presently before the Court. *Tormey* v. *Immigration and Naturalization Service*, No. 122, this Term.

APPENDIX

Section 242(d) of the Immigration and Nationality Act, 66 Stat. 211, as amended by the Act of September 3, 1954, § 17, 68 Stat. 1232 [12] (8 U.S.C. 1252 (d)), provides:

> (d) Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined

[12] The 1954 amendment merely eliminated the characterization of the defined offense as a felony.

not more than $1,000 or imprisoned not more than one year, or both.

Section 106(a)(6) of the Immigration and Nationality Act, 75 Stat. 651-652 (8 U.S.C. 1105a(a)(6)), provides:

> (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq. [now 28 U.S.C. (Supp. III) 2341-2351], shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—
>
> * * * *
>
> (6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28,

United States Code.[13] Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act[14] or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeal shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

* * * *

[13] 28 U.S.C. 2201 establishes the general jurisdiction of courts of the United States to make declaratory judgments.

[14] Section 360(a) of the Immigration and Nationality Act (8 U.S.C. 1503(a)) provides for a special procedure whereby persons claiming rights as nationals of the United States who are denied such rights by a federal department or official may sue to have themselves declared nationals.

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